STATE OF MICHIGAN

COURT OF APPEALS

RONALD MAYGAR,

Plaintiff-Appellee,

v

CLIO AREA SCHOOL DISTRICT,

Defendant,

and

FAY LATTURE,

Defendant-Appellant.

UNPUBLISHED
April 27, 2006

No. 264931
Genesee Circuit Court
LC No. 04-078212-CL

Before: Fort Hood, P.J., and Sawyer and Meter, JJ.

PER CURIAM.

Defendant Fay Latture appeals as of right from an order denying her motion for summary disposition. We reverse and remand for entry of summary disposition in favor of defendant Latture.

Plaintiff alleges that he was transferred from his position as principal of Clio High School because of his conduct in speaking out and surveying the students at the high school about a proposal to change the school's final examination schedule. In the past, the school had scheduled six examinations over two days, but the district changed that schedule so that students were only required to take one or two examinations a day, spread out over the testing week. Some department heads at the high school suggested going back to the old schedule. Plaintiff sent a memorandum to the homeroom teachers asking them to survey the students about going back to the former examination schedule. This prompted a series of complaints from students and parents who were upset about going back to the old schedule.

Plaintiff was thereafter transferred from his position as principal of Clio High School to the position of community education director for the school district. Plaintiff subsequently filed this action against the Clio School District and its superintendent, Fay Latture, alleging claims pursuant to 42 USC 1983 for violations of his right to free speech. The trial court granted summary disposition for both defendants based on qualified immunity. Subsequently, after

granting plaintiff's motion for reconsideration, the court again granted summary disposition in favor of the school district, but denied summary disposition with respect to defendant Latture.

On appeal, defendant Latture argues that the trial court erred in denying her motion for summary disposition based on qualified immunity. We agree.

Summary disposition may be granted under MCR 2.116(C)(7) if a claim is barred because of immunity granted by law. The standard for reviewing a motion brought under MCR 2.116(C)(7) is as follows.

> A defendant who files a motion for summary disposition under MCR 2.116(C)(7) may (but is not required to) file supportive material such as affidavits, depositions, admissions, or other documentary evidence. MCR 2.116(G)(3); *Patterson v Kleiman*, 447 Mich 429, 432; 526 NW2d 879 (1994). If such documentation is submitted, the court must consider it. MCR 2.116(G)(5). If no such documentation is submitted, the court must review the plaintiff's complaint, accepting its well-pleaded allegations as true and construing them in a light most favorable to the plaintiff. [*Turner v Mercy Hospitals & Health Services of Detroit*, 210 Mich App 345, 348; 533 NW2d 365 (1995).]

If the pleadings or other documentary evidence fail to establish a genuine issue of material fact, the court must decide as a matter of law whether the claim is barred. *Holmes v Michigan Capital Medical Ctr*, 242 Mich App 703, 706; 620 NW2d 319 (2000).

Plaintiff argued that he was demoted as a result of exercising his right of free speech, contrary to 42 USC 1983. Pursuant to 42 USC 1983, "any person who experiences 'the deprivation of any rights, privileges, or immunities secured by the Constitution and laws' because of the actions of another person acting 'under color of any statute, ordinance, regulation, custom, or usage, of any State' may file an action seeking relief against the party that caused the deprivation." *Hojeije v Dep't of Treasury*, 263 Mich App 295, 303; 688 NW2d 512 (2004). A public official accused of violating 42 USC 1983 may rely on the defense of qualified immunity to avoid a trial. *Id*.

A three-part test is generally used to determine if qualified immunity is available.

> "*First*, we determine whether, based upon the applicable law, the facts viewed in the light most favorable to the plaintiffs show that a constitutional violation has occurred. *Second*, we consider whether the violation involved a clearly established constitutional right of which a reasonable person would have known. *Third*, we determine whether the plaintiff has offered sufficient evidence to indicate that what the official allegedly did was objectively unreasonable in light of the clearly established constitutional rights."
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> *Champion v. Outlook Nashville, Inc.*, 380 F.3d 893, 900-01 (6th Cir.2004) (citation omitted). If the answer to all three questions is yes, then qualified immunity is not proper. *Id*. at 901. [*Beard v Whitmore Lake School Dist*, 402 F3d 598, 602-603 (CA 6, 2005) (emphasis in original).]

Although plaintiff correctly observes that a two-part test has also been used, both tests are appropriate, but the three-part test is generally considered the more accurate statement of the law. *Estate of Carter v City of Detroit,* 408 F3d 305, 310-311 n 2 (CA 6, 2005).

The basis for plaintiff's claim is that he was removed from his position as principal of Clio High School in retaliation for exercising his First Amendment rights by expressing an opinion about the high school's examination schedule and seeking input from students about changing that schedule. The law governing such a claim is set forth in *Farhat v Jopke,* 370 F3d 580, 588 (CA 6, 2004), as follows:

> To establish a prima facie case of First Amendment retaliation under 42 U.S.C. § 1983, Appellant must demonstrate that: (1) he was engaged in a constitutionally protected activity; (2) he was subjected to adverse action or deprived of some benefit; and (3) the protected speech was a "substantial" or "motivating factor" in the adverse action. *Leary v. Daeschner*, 349 F.3d 888, 897 (6th Cir. 2003) (citations omitted).
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> The framework for analyzing a First Amendment retaliation case is well-established. In *Rodgers v. Banks*, 344 F.3d 587 (6th Cir. 2003), this court recently summarized this analysis:
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> "While public employees may not be required to sacrifice their First Amendment free speech rights in order to obtain or continue their employment, *Rankin v. McPherson*, 483 U.S. 378, 383, 107 S.Ct. 2891, 97 L.Ed.2d 315 (1987) (citing *Perry v. Sindermann*, 408 U.S. 593, 597, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972)), a state is afforded greater leeway to control speech that threatens to undermine the state's ability to perform its legitimate functions. See *United States v. Nat'l Treasury Employees Union*, 513 U.S. 454, 475 n. 21, 115 S.Ct. 1003, 130 L.Ed.2d 964 (1995). Therefore, in determining whether a public employer has violated the First Amendment by firing a public employee for engaging in speech, the Supreme Court has instructed courts to engage in a three-step inquiry. First, a court must ascertain whether the relevant speech addressed a matter of public concern. *See Connick v. Myers*, 461 U.S. 138, 143, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983). If the answer is yes, then the court must balance the interests of the public employee, "as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering v. Bd. of Educ*., 391 U.S. 563, 568, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968). Finally, the court must determine whether the employee's speech was a substantial or motivating factor in the employer's decision to take the adverse employment action against the employee. *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977); *Perry* [*v McGinnis,* 209 F3d 597 (CA 6, 2000)], 209 F.3d at 604.

If the plaintiff meets his burden of establishing a prima facie case, the burden shifts to the defendant to show, by a preponderance of the evidence, that there were other reasons for the adverse action and that the same result would have occurred even if the plaintiff had not engaged in the protected activity. *Leary v Daeschner,* 349 F3d 888, 898 (CA 6, 2003).

Defendant Latture first argues that the evidence failed to show that the challenged conduct involved speech. She argues that plaintiff himself did not engage in any speech, but rather only proposed to change the school's examination schedule at the urging of the school's department heads. Here, the protected speech in question involves plaintiff's efforts to bring the subject of the examination schedule up for discussion amongst the teachers and students. Protected speech under the First Amendment need not involve the personal opinions of the individual asserting his rights. *Cockrel v Shelby Co School Dist,* 270 F3d 1036, 1049-1050 (CA 6, 2001). Regardless of plaintiff's personal views on the subject of the examination schedule, his decision to seek the input of the teachers and students constitutes speech. *Id.* Plaintiff sufficiently established this element of his claim.

Defendant Latture also argues that plaintiff 's speech did not involve a matter of public concern. Even if plaintiff was engaged in speech in proposing to change the examination schedule, he was required to prove that his speech involved a matter of public concern, which is a question of law. *Farhat, supra* at 588; *Leary, supra* at 898.

"Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record." *Connick v Myers,* 461 US 138, 147-148; 103 S Ct 1684; 75 L Ed 2d 708, 720 (1983). To constitute speech on a matter of public concern, an employee's comments must relate to "any matter of political, social, or other concern to the community." *Id*. at 146. Conversely, if a public employee's speech involves only matters of a personal interest, liability will not be imposed:

> We hold only that when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior. Cf. *Bishop v. Wood,* [426 US 341] 349-350, 48 L Ed 2d 684, 96 S Ct 2074 [(1976)]. Our responsibility is to ensure that citizens are not deprived of fundamental rights by virtue of working for the government; this does not require a grant of immunity for employee grievances not afforded by the First Amendment to those who do not work for the State. [*Connick, supra* at 147.]

Arguably, the issue in this case involved a matter of public concern, but only because plaintiff made it one. Plaintiff was required to make changes to the examination schedule after defendant Latture advised him that he needed to add a few more hours to the school's schedule to meet annual quotas. Plaintiff made the subject a matter of public concern when he raised the issue of the examination schedule first to his department heads, then to all teachers, and then to the students. After the students and their parents learned that the examination schedule might be changed to the way it had been in the past, requiring up to three examinations in one day, many in the community became upset and responded with complaints to school board members. Because the subject of the school examination schedule became a matter of concern to the local school community, we conclude that plaintiff sufficiently established that his speech involved a matter of public concern.

Defendant Latture next argues that plaintiff's interests in speaking out were outweighed by the school district's interests. On this point, we agree with defendant Latture.

If an employee's speech involves a matter of public concern, a court must next balance the interests of the employee "as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering v Bd of Ed of Twp High School Dist 205*, 391 US 563, 568; 88 S Ct 1731; 20 L Ed 2d 811, 817 (1968). Speech by a public employee will not be constitutionally protected, even if it involves matters of public concern, unless the employee's interest in speaking outweighs the interest of the state in performing its services. *Cockrel, supra* at 1053. As the court explained in *Cockrel, supra* at 1053:

> In striking the balance between the State's and the employee's respective interests, this court has stated that it will "consider whether an employee's comments meaningfully interfere with the performance of her duties, undermine a legitimate goal or mission of the employer, create disharmony among co-workers, impair discipline by superiors, or destroy the relationship of loyalty and trust required of confidential employees." *Williams v. Kentucky*, 24 F.3d 1526, 1536 (6th Cir.), *cert. denied*, 513 U.S. 947, 115 S.Ct. 358, 130 L.Ed.2d 312 (1994) (citing *Rankin v. McPherson*, 483 U.S. 378, 388, 107 S.Ct. 2891, 97 L.Ed.2d 315 (1987)). [*Cockrel, supra* at 1053.]

An employer may be required to make a particularly strong showing that the employee's speech interfered with the workplace if the employee's speech substantially involved a matter of public concern. *Id.* In this case, plaintiff's speech did not substantially involve a matter of public concern. Therefore, in order to prevail, defendant Latture was not required to make a particularly strong showing that plaintiff's speech interfered with the workplace.

Under the undisputed facts of this case, we conclude that plaintiff cannot prevail on this element. The public concern over the examination schedule became an issue for the community only because plaintiff proposed changing the schedule to the detriment of the students' interests. In effect, plaintiff made the examination schedule a matter of public scrutiny by opening the issue to the teachers and students.

The parties agree that it was plaintiff's job, as the school principal, to add two additional hours to the examination schedule. But instead of adding in the hours, plaintiff tried to change the examination schedule and involved everyone affected in the process. Moreover, plaintiff attempted to implement a schedule that had been rejected and abandoned by the school district in the past. Plaintiff's conduct had the effect of challenging the district's earlier decision to change the schedule, a form of insubordination. Plaintiff's conduct created unnecessary stress and anxiety amongst the students and parents after the school district had previously resolved the issue of the scheduling of examinations. Plaintiff's conduct of bringing the examination schedule up for a vote under these circumstances had the effect of creating disharmony among all involved, because the students' interests conflicted with their teachers' interests. Under the circumstances, defendant Latture's decision to transfer plaintiff because of the detrimental effect his actions had on the school outweighed plaintiff's interest in speaking out about a proposed change in the examination schedule. See *Sharp v Lindsey*, 285 F3d 479, 486-487 (CA 6, 2002) (the interests in maintaining a tension-free relationship between a school superintendent and a

principal outweighed the plaintiff's interest in trying to make himself look good at the expense of the superintendent and the school board).

Furthermore, we do not believe that plaintiff has shown that his speech was a substantial or motivating factor in defendant Latture's decision to transfer him. To establish a prima facie claim of First Amendment retaliation under 42 USC 1983, plaintiff was also required to show that his protected speech was a substantial or motivating factor in the decision to transfer him to the new position. *Farhat, supra* at 588. To prove a substantial or motivating factor,

> the employee must "'point to specific, nonconclusory allegations reasonably linking her speech to employer discipline.'" *Farmer v. Cleveland Pub. Power*, 295 F.3d 593, 602 (quoting *Bailey v. Floyd County Bd. of Educ.*, 106 F.3d 135, 144 (6th Cir.1997)). If the employee meets that burden, the employer may "show[ ] by a preponderance of the evidence that it would have reached the same decision . . . even in the absence of the protected conduct." *Mt. Healthy* [*City Sch Dist Bd of Educ v Doyle*], 429 U.S. [274] at 287, 97 S.Ct. 568 [50 L Ed 2d 471 (1977)]. However, this latter burden "involves a determination of fact" and ordinarily is "reserved for a jury or the court in its fact-finding role." *Perry* [*v McGinnis*], 209 F.3d [597] at 604 n. 4 [(CA 6, 2000)] (citing *Tao v. Freeh*, 27 F.3d 635, 639 (D.C.Cir.1994)). [*Rodgers v Banks,* 344 F3d 587, 602 (CA 6, 2003).]

Under the undisputed facts here, if plaintiff's speech played any role in his transfer, it was because plaintiff was insubordinate by presenting the issue of the school's examination schedule to the teachers and students after the matter was resolved by the school board, and by proposing a change that was directly contrary to what the board had earlier decided. This case is analogous to *Connick, supra*, in which an assistant district attorney used an internal survey sent to her coworkers to attempt to change office procedures. Although the employee in *Connick* may have touched upon public concerns in her survey, the Court concluded that her conduct overall was more appropriately an employee grievance concerning internal office policies, which was not protected by the First Amendment. *Connick, supra* at 154.

Moreover, we agree with defendant Latture that plaintiff was a confidential or policymaking employee. Where a confidential or policymaking public employee is discharged for speech related to his political or policy views, the *Pickering* balance favors the government as a matter of law. *Rose v Stephens,* 291 F3d 917, 921 (CA 6, 2002). Because plaintiff's position required that he implement the policies of the school board and the superintendent, we agree that he was a confidential employee. See *Latham v Office of the Attorney Gen of the State of Ohio,* 395 F3d 261, 268-269 (CA 6, 2005).

With respect to the final two elements of the three-part test for qualified immunity, we agree with defendant Latture that plaintiff cannot establish a prima facie case.

For the second element, we must consider whether the violation involved a clearly established constitutional right of which a reasonable person would have known. *Beard, supra* at 603. A plaintiff attempting to overcome the defense of qualified immunity bears the burden of establishing that a reasonable official in the defendant's position would not have believed that his conduct was lawful. *Hojeije, supra* at 304. "Immunity is not available if the official knew or

should have known that the actions would violate the plaintiff's constitutional rights or if the official acted with the malicious intention to deprive the plaintiff of his constitutional rights or otherwise injure the plaintiff." *Thomas v McGinnis*, 239 Mich App 636, 645; 609 NW2d 222 (2000).

The undisputed facts here show that defendant Latture suspended and transferred plaintiff primarily because she believed he was insubordinate. Also, as previously discussed, because plaintiff occupied a policymaking or confidential position, it was not inappropriate for defendant Latture to take adverse action against him for speaking out against a policy adopted by the school board. Accordingly, plaintiff cannot establish that a reasonable official in defendant Latture's position would not have believed that her conduct was lawful.

For third element of the three-part test, plaintiff was required to offer evidence to prove that what defendant Latture did was objectively unreasonable in light of the clearly established constitutional right. *Beard, supra* at 603. In this case, it was not objectively unreasonable for defendant Latture to reassign plaintiff to a new position. For these reasons, defendant Latture was entitled to qualified immunity, and the trial court erred in denying her motion for summary disposition.

Reversed and remanded for entry of summary disposition in favor of defendant Latture. We do not retain jurisdiction.

/s/ Karen M. Fort Hood
/s/ David H. Sawyer
/s/ Patrick M. Meter